

Congress of the United States

Committee on Foreign Affairs

House of Representatives

Rep Berman

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87-5805

Dave -



should see

this, I guess. The Berman bill
was introduced, with some changes,
in the 18th

Cheers

Mike Van Dusen

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Congress of the United States

House of Representatives

Washington, DC 20515

HOWARD L. BERMAN

26TH DISTRICT, CALIFORNIA

November 18, 1987

INFORMATION MEMORANDUM

Antiterrorism and Arms Export Amendments Act of 1987

During the last year a clear need has developed to reaffirm two fundamental principles of American foreign policy embodied in statute law: 1) the prohibition on the export of military weapons to states which support international terrorism, and 2) the obligation of the executive branch to keep Congress informed of both overt and covert exports of military weapons to foreign governments. While these principles are clear, and while they have been publicly supported by the Reagan Administration and Congress, the implementation of them pursuant to the law remains in doubt.

Rep. Howard Berman has authored the Antiterrorism and Arms Export Amendments Act of 1987 (the "Act") to reaffirm this country's prohibition on exports of military weapons to terrorist states and to require more detailed and periodic reporting by the executive of arms exports. The Act, which is co-sponsored by Reps. Dante Fascell, Lee Hamilton, and Henry Hyde, makes little substantive change in the law. Its intent is to close potential loopholes and revise certain existing provisions to ensure that uniform standards are present throughout the U.S. Code. The Act makes no attempt to reform the structure of the National Security Council, revolutionize the manner in which arms exports are approved by the U.S. Government, or impose blanket sanctions on terrorist states.

The Act would amend the Arms Export Control Act, the Foreign Assistance Act of 1961, the Export Administration Act and the Hostage Act of 1968. The legislation includes the following major provisions:

--Section 40 of the Arms Export Control Act, which prohibits exports of arms to terrorist states, would be significantly reinforced. Prohibited transactions are explained in detail, both with respect to U.S. Government activities and private transactions. The amended Section 40 would have extraterritorial reach, meaning that arms deals arranged by the U.S. Government or by U.S. persons overseas would be subject to the Section 40 prohibitions. The President could waive the prohibitions for specific transactions, but only with prior,

detailed reporting to Congress (on a classified basis if necessary). If the arms transfer is part of a covert operation pursuant to a Presidential (Hughes-Ryan) finding under Section 662 of the Foreign Assistance Act, then the President is explicitly required to give notice to the House and Senate intelligence committees of the arms transfer (in addition to his normal reporting requirements to the intelligence committees). The amended Section 40 also would have criminal penalties similar to those found in the Export Administration Act.

--Section 6(j) of the Export Administration Act, which regulates the export of goods and technology of military value to terrorist states, would be amended to 1)remove the current \$1,000,000 annual threshold amount under which the executive currently does not have to report to Congress exports of goods and technology of military value to terrorist states, 2)incorporate into statute law some of the tough standards which currently are in Commerce Department regulations only for selected, but not all, terrorist states, 3)require validated licenses for all such exports to terrorist states and 30-day prior notification to Congress of the proposed issuance of a validated license, 4)require a 90-day (as opposed to the current 30-day) prior notification to Congress of a rescission by the Secretary of State of his determination that a country repeatedly supports international terrorism.

--Section 620A of the Foreign Assistance Act of 1961, the "antiterrorism" section of that Act, would be amended to conform it with other changes in the law, particularly the revision of Section 40 of the Arms Export Control Act.

--Sections 3(a) and 38 of the Arms Export Control Act and Section 505 of the Foreign Assistance Act of 1961 would be amended to require that before the President consents to the transfer of military weapons from a recipient country to a third country, he must give prior notification to Congress.

--Section 36(a) of the Arms Export Control Act would be amended to require quarterly reports (classified if necessary) from the President of inter-agency transfers of military weapons which will not ultimately be disposed of within the United States.

--The Hostage Act of 1868 would be amended simply to clarify that the President's authority to take action to release hostages cannot be carried out in a manner which would otherwise be prohibited by law.

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Antiterrorism and Arms Export Amendments Act of 1987

H.R. []

in the House of Representatives

(Author: Howard Berman. Co-sponsors: Dante Fascell, Lee Hamilton,
Henry Hyde)

Section-by-Section Analysis

SECTION 1. SHORT TITLE

The title of H.R. [], namely the Antiterrorism and Arms Export Amendments Act of 1987, reflects the fact that the legislation amends certain provisions of law dealing with antiterrorism policies and with the regulation of arms exports.

**SECTION 2. PROHIBITION ON ARMS TRANSACTIONS WITH COUNTRIES
SUPPORTING TERRORISM.**

Existing Prohibitions

Since 1977, the Arms Export Control Act (AECA) has

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prohibited all sales under AECA "to any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism." (Section 3(f) of AECA) If the President "finds that national security justifies a continuation of sales" to any such government, the sales may continue provided the President reports his finding to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate.

Heightened concern over acts of international terrorism led to passage of Section 509(a) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which added Section 40 to AECA. The new Section 40 prohibits the export of any items on the United States Munitions List "to any country which the Secretary of State has determined, for purposes of section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), has repeatedly provided support for acts of international terrorism." The Secretary of State's determination under the Export Administration Act is an explicit designation of a country as one which has repeatedly provided support for acts of international terrorism. It serves as a useful procedure by which the U.S. Government designates a "terrorist" state, and it is referenced in Section 40 of AECA for the purpose of prohibiting arms exports to identifiable terrorist states. There are currently five states which the Secretary of States has determined have repeatedly provided support for acts of international terrorism: Iran, Syria, Libya, Cuba and the

People's Democratic Republic of Yemen.

Therefore, Section 40 currently prohibits arms exports to those five countries.

Sections 3(f) and 40 of AECA establish potentially inconsistent standards in the law. Under Section 3(f), the identification of a "terrorist" government is not entrusted with any particular U.S. Government official. This can lead to delay and failure to invoke the Section 3(f) prohibition. Section 3(f) also addresses only one aspect of support for international terrorism--providing sanctuary for terrorists. Under Section 40, the identification of a "terrorist" state (as opposed to a "terrorist" government) is clearly established by means of the Secretary of State's determination. But Section 40 does not explicitly refer to the provision of sanctuary for terrorists. Instead, Section 40 refers to a state which has repeatedly provided support for international terrorism (a standard that arguably should include providing sanctuary for terrorists).

In addition, the Presidential waiver standards under both sections differ. Under Section 40, "a particular export" can be made to a "terrorist" state "if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver." The

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Section 3(f) waiver applies to "a continuation of all sales", rather than a particular export, and has no defined term. The prohibition under Section 3(f) extends for renewable one-year periods, whereas the prohibition under Section 40 is indefinite until the Secretary of State's determination with respect to a particular country is rescinded pursuant to Section 6(j)(2) of the Export Administration Act.

Uniform Standards

There is no reason why AECA should have two sections dealing with the same prohibition. H.R. [] consolidates Sections 3(f) and 40 into an expanded and reinforced Section 40. The amended Section 40 explains in detail the broad prohibitions which currently exist in Sections 3(f) and 40 and establishes uniformity in the legal standards prohibiting arms exports to governments supporting international terrorism.

The amended Section 40 explicitly provides that both the United State Government and United States persons are subject to the prohibitions in Section 40. "United States person" is defined broadly to include citizens and residents of the United States, domestic establishments of foreign companies, and foreign subsidiaries or affiliates of U.S. companies. Actions taken by a United States person either within or outside the United States are covered by the Section 40 prohibition.

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The amended Section 40(b) creates a uniform standard for identifying governments which support international terrorism. The amended language provides for the Secretary of State to make one of two determinations--either that the government of a country "grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism". or that it "has repeatedly provided support for acts of international terrorism." The uniform standard thus combines the sanctuary principle of Section 3(f) with the standard in Section 6(j)(1) of the Export Administration Act requiring repeated support for acts of international terrorism. This standard also appears in other amendments of H.R. [] where the Secretary of State's determination is required.

Prohibited Actions

The list of prohibited actions under amended Section 40 comprehensively covers every type of transaction provided for under AECA. The United States Government is prohibited from

--exporting or otherwise providing (by sale, lease or loan, grant, or other means), directly or indirectly, any munitions item to a "terrorist" country,

--providing credits, guarantees, or other financial assistance for the acquisition of any munitions item by such country,

--consenting to any transfer of any munitions item to such country,

--providing any license or other approval for any export or other transfer (including by means of a technical assistance agreement, manufacturing licensing agreement, or coproduction agreement) of any munitions item to such country, or

--otherwise participating directly or indirectly in, or take any action to facilitate, the acquisition of any munitions item by such country. This final prohibition covers any department, agency or other instrumentality of the U.S. Government and any officer or employee of the U.S. Government (including members of the U.S. Armed Forces), and any person acting at the request or on behalf of the U.S. Government.

Under amended Section 40, a United States person is similarly prohibited from intentionally exporting or otherwise providing directly or indirectly (by sale, lease or loan, grant, or any other means) any munitions item to a "terrorist" country. This prohibition also extends to direct or indirect participation in the acquisition of any munitions item by a "terrorist" country, or any action to facilitate such acquisition. Further, a United States person is prohibited from undertaking any such transaction with "any person or entity which that United States person has reason to believe will provide such item to any such

country".

Definition of Munitions Item

The types of munitions items covered by the amended Section 40 prohibition are those which, if they were imported into or exported from the United States, would be on the United States Munitions List. In effect, this means that every type of military weapon, wherever it is manufactured, is covered.

Rescission of Determinations

The amended Section 40(d) of AECA describes the procedures for a rescission of the Secretary of State's determination that a government supports international terrorism. These procedures are almost identical to those described in the current Section 6(j)(2) of the Export Administration Act. They are incorporated in the amended AECA, in the amendment to Section 620A of the Foreign Assistance Act and in the amended Section 6(j)(2) of the Export Administration Act.

The changes in the rescission provisions are two in number. First, the amendment changes the prior notice period to Congress from 30 days to 90 days. This will allow Congress sufficient time to consider a proposed rescission and, if desirable, pass legislation to block it. Second, there is an amendment to the criteria that must be satisfied before the

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Secretary of State can rescind a determination. Under current law, it must be shown that, among other things, the subject government does not support or provide sanctuary for any major terrorist or terrorist group "in its territory". The amendment deletes the phrase "in its territory" for two reasons. It must be shown that the subject government does not support any major terrorist or terrorist group anywhere, not just in its own territory. The obvious character of international terrorism, where a government can support acts of terrorism outside its jurisdiction, requires this clarification. Although in most cases providing sanctuary means that the sanctuary is in the subject country's territory, it is clearly possible that a government could give material support to the granting of sanctuary for terrorists in another country's territory.

President's Waiver Authority

The amended Section 40 of AECA spells out in considerable detail the President's authority to waive the prohibition on a specific transaction. First, the new Section 40(e) of AECA would require a determination that the transaction is "vital to the national security interests", rather than "important to the national security interests". This amendment brings Section 40 of AECA in line with the standard already applied in the waiver language of Section 614(a)(2) of the Foreign Assistance Act of 1961.

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Second, no later than 15 days prior to the proposed transaction the President is required to consult with and deliver a report to the Foreign Affairs Committee of the House and to the Foreign Relations Committee of the Senate. The report is intended to be detailed enough to enable the two committees to properly evaluate the nature and scope of the proposed transaction. Classified information can be provided in an addendum to the report.

Exemption for Covert Arms Transfers

The new amended Section 40(f) of AECA provides an exemption from the Section 40 prohibition provided the notification requirements of the new amended Section 36(e) of AECA are satisfied. Section 8 of H.R. [] will amend Section 36 of AECA to explicitly require notification to the House and Senate intelligence committees of any covert arms transfer by the United States Government. Specifically, the amendment provides that the Government may not transfer or assist in the transfer of any munitions item directly or indirectly to any foreign government, foreign group or person, or any other person outside the United States Government, unless the House and Senate intelligence committees are notified of the particular arms transfer in accordance with the notification procedures set forth in Section 501 of the National Security Act.

Under current law, there must be a Presidential finding

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under Section 662 (Hughes-Ryan) of the Foreign Assistance Act of 1961 that the intelligence operation (pursuant to which the arms are being transferred) is important to the national security of the United States. The intelligence committees of the House and the Senate must be notified of the intelligence operation pursuant to Section 501 of the National Security Act. The amendment would ensure that the intelligence committees are informed of any arms transfers which may be a part of any such intelligence operation.

Relation to Other Laws

The new amended Section 40(g) of AECA provides that the Section 40 prohibition will apply notwithstanding the general waiver provisions found in Section 614(a) of the Foreign Assistance Act of 1961 or notwithstanding any other provision of law. The intent is establish a uniform standard of prohibition subject to no potentially inconsistent waiver authority in any other statute. No other statutory provision can be invoked to permit a transaction which is prohibited by Section 40. This reaffirms Section 40 of AECA as the overriding statutory prohibition on arms exports to countries which support international terrorism.

Criminal and Civil Penalties

The new amended Sections 40(h) and 40(i) of AECA provide,

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for the first time, criminal and civil penalties for violation of the provisions of Section 40. The criminal penalty may be up to \$1,000,000, imprisonment for not more than 10 years, or both. The President may exercise the same powers concerning violations and enforcement set forth in the Export Administration Act, except that a civil penalty under Section 40 of AECA may not exceed \$500,000.

SECTION 3. CONSIDERATIONS IN ISSUANCE OF ARMS EXPORT LICENSES AND IN ARMS SALES.

Section 3 of H.R. [] adds one more criterion to the Government's consideration of the issuance of export licenses for munitions items and in the Government's evaluation of arms sales. In deciding upon whether to issue an export license, the President is required to take into account the opinion of the Director of the Arms Control and Disarmament Agency (ACDA) as to whether the export of an article "will contribute to an arms race, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control arrangements." The additional criterion in the new amended Section 38(a)(2) of AECA will be whether the export of an article will "support international terrorism".

Further, where arms sales are concerned, the President's

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report to Congress under Section 36(1)(D) of AECA will have to include an evaluation prepared by the Director of ACDA in consultation with the Secretary of State and the Secretary of Defense of the manner, if any, in which the proposed sale would support international terrorism.

SECTION 4. EXPORTS TO COUNTRIES SUPPORTING TERRORISM.

Section 4 of H.R. [] amends in four important respects Section 6(j) of the Export Administration Act, which governs the export of goods and technology of military value to countries which have been designated by the Secretary of State as repeatedly providing support for acts of international terrorism.

First, the amendment removes the current \$1,000,000 annual threshold amount under which the Secretary of Commerce and the Secretary of State do not have to report to Congress licensed exports of goods and technology of military value to a country which the Secretary of State has determined has repeatedly provided support for acts of international terrorism. Section 509(b) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 lowered the annual threshold amount from \$7,000,000 to \$1,000,000. Where a "terrorist" country is concerned, however, there should be no threshold amount under which Congress should remain ignorant of exports of goods or technology that can aid the military or terrorist activities of such country. Removing

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the threshold amount does not prevent exports of such goods and technology; it merely requires that the exports be properly reported to Congress at least 30 days before the license for the exports is approved. The 30-day prior notice period exists under current law, but only in respect of exports which exceed the \$1,000,000 annual threshold amount.

Second, the amendment requires a validated license for all such exports of goods or technology of military value to a "terrorist" country. Under current Commerce Department regulations, a validated license is only sporadically required depending on the country and the item being exported. The amendment would incorporate into statutory law a prudent requirement for each of the countries which is on the Secretary of State's "terrorist" list. For every export of goods or technology of military value, the exporter would have to obtain an export license, meaning a "validated" license for that particular export rather than a multiple-use license for a series of exports. When dealing with a "terrorist" country, it would be foolish to permit an exporter to engage in a series of transactions without examining each export under the circumstances prevailing at the time of the export.

The amended language also stipulates that applications for any such validated license shall be generally denied by the Secretary of Commerce. Again, the presumption of denial exists in some Commerce Department regulations (especially with respect

to Iran). It should be a statutory requirement applied to all of the Secretary of State's listed "terrorist" countries, rather than sporadically to one or two designated countries in the regulations. The presumption can be overcome as long as a 30-day prior notice is delivered to Congress. The utility of the presumption is that it discourages trade in goods or technology of military value with "terrorist" states.

Third, the new amended Section 6(j)(1) of the Export Administration Act includes in subparagraph (A) the uniform standard for determining "terrorist" countries which appears in other amendments to AECA and the Foreign Assistance Act. This adds to the current Section 6(j)(1)(A) the standard under which a government which grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism is subject to the notification requirement.

Fourth, subparagraph (B) establishes the military value standard for goods and technology under the Section 6(j)(1) notification requirement. Under current law, it has to be shown that the exports "would make a significant contribution to the military potential of such country, including its military logistics capability, or would enhance the ability of such country to support acts of international terrorism." That language is amended to read that the "exports of such goods or technology would contribute to the military potential of such country, would be destined to a military end-user or for military

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end-use in such country, or would enhance the ability of such country to support acts of international terrorism." The amended language drops the requirement that a "significant" contribution be shown. This is an entirely subjective standard open to varying interpretations. A simpler test of contribution would require that Congress be notified of essentially all exports of goods or technology of military value to "terrorist" states, rather than debate with the executive over what does or does not constitute a "significant contribution". Since such exports should be minimal in any event, this is not an onerous requirement.

A further amendment to subparagraph (B) is the inclusion of dual-use items, i.e. those exports that "would be destined to a military end-user or for military end-use in such country". This concept already appears in Commerce Department regulations, particularly with respect to Iran, and should be applied to all "terrorist" countries. The words, "including its military logistics capability", have been deleted simply because the broader wording which precedes it should stand on its own without qualification.

Fifth, current Section 6(j)(2) of the Export Administration Act, which provides for a rescission of the Secretary of State's determination under Section 6(j)(1)(A), is amended to conform with new amended Section 40(d) of AECA and the new amended Section 620A(c) of the Foreign Assistance Act of

1961. These three rescission sections all require a 90-day prior notification to Congress of a proposed rescission and, as explained under the discussion about Section 2 above, clarify the conditions that must be met before the President may rescind the Secretary of State's determination.

SECTION 5. PROHIBITION ON ASSISTANCE TO COUNTRIES SUPPORTING INTERNATIONAL TERRORISM.

Section 620A of the Foreign Assistance Act of 1961, that Act's antiterrorism section, is amended to exclude AECA from the prohibition against assistance to "terrorist" countries. Amended Section 40 of AECA prohibits any provision of assistance under that Act to "terrorist" countries. Therefore, it would be redundant and inconsistent with the terms of Section 40 to retain reference to AECA in Section 620A.

Section 620A also is amended to standardize subparagraph (a)(2) with the uniform standard for determining "terrorist" countries which appears in other amendments. Thus the words "otherwise supports international terrorism" are replaced with "has repeatedly provided support for acts of international terrorism".

The new amended Section 620A(c) incorporates the standard rescission language discussed above. The new waiver language in

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amended Section 620A(d) differs from current Section 620A(b) in three major respects. First, humanitarian reasons could be used to justify military assistance or Export-Import Bank financing which could be used for military weapons purchases. Second, the 15-day prior notice requirement under current law is clarified to require prior consultation with Congress and a detailed report that includes not only the justification for the waiver, but other information such as the name of the recipient country, a description of the national security or humanitarian interests which require the waiver, the type and amount of assistance to be provided pursuant to the waiver, and the period of time during which the waiver will be effective. A final new sentence ensures that assistance provided under Section 620A's waiver authority cannot be provided if such assistance would violate the prohibitions of Section 40 of AECA. This will avoid any inconsistency between the two provisions.

SECTION 6. NOTICE TO CONGRESS OF THIRD COUNTRY TRANSFERS.

Current law generally requires that the President consent to any transfer of military weapons from a recipient country or party to a third country or party. There is no legal requirement that such consents be notified in advance to Congress. Section 6 of H.R. [] amends certain provisions of AECA and the Foreign Assistance Act of 1961 to require that Congress receive a report (referred to below as the "transfer report") at least 15 days

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before the effective date of the Presidential consent "unless the President certifies in his report that an emergency exists which requires that consent become effective immediately in the national security interests of the United States". The President must also notify Congress in writing "of any developments which alter or supplement the information provided in such report".

Items Sold Under FMS Program

The first amended provision is Section 3(a) of AECA. Under current law, Section 3(a) requires that items sold under the foreign military sales program by the United States to a recipient country cannot be transferred by that recipient country to anyone not an officer, employee or agent of that country or used for unauthorized purposes without Presidential consent. The last sentence of Section 3(a) requires the President to promptly submit a report to Congress on the "implementation" of each recipient country's agreement with the United States to adhere to this Presidential consent requirement.

The amended Section 3(a) revises the last sentence to require that before the President may consent to a third country transfer, he must file with Congress the transfer report and supplement it when necessary.

Items Exported Pursuant to a Munitions License

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Section 38 of AECA governs the issuance of export licenses for items on the U.S. Munitions List. Under Section 3(d)(3) of AECA, big ticket items (i.e., major defense equipment valued at \$14,000,000 or more or any defense article or defense service valued at \$50,000,000 or more) which have been licensed or approved under Section 38 of AECA cannot be transferred to a third country without prior Presidential consent and the submission of a report to Congress at least 30 days prior to such consent. This means that the transfer of licensed munitions items which have a value less than these amounts need not be reported to Congress.

The amended Section 38 requires that in those instances where a report is not required under Section 3(d)(3), the President nonetheless must submit to Congress the transfer report and supplement it when necessary.

Items Provided Under MAP Program

U.S. foreign military assistance (MAP) provided pursuant to Section 505 of the Foreign Assistance Act of 1961 requires that the President consent to any recipient country transferring any defense articles obtained under MAP. The amended Section 505 would require that the President submit the transfer report to Congress prior to granting his consent.

SECTION 7. DOD TRANSFERS TO OTHER AGENCIES.

Under Section 36(a) of AECA, the President is required to submit quarterly reports to Congress describing all commercial and governmental military exports. The amendment to Section 36(a) would add a new subparagraph (10) requiring a quarterly report listing all transfers of defense articles and defense services from the Department of Defense to any other Government department, agency or other entity if the value, singly or in aggregate, was \$250,000 or more during the quarter for which the report is submitted and the military items are not transferred for use disposition or use solely within the United States. This report is intended to capture inter-agency transfers which are destined for foreign recipients.

SECTION 8. NOTICE TO CONGRESS OF CERTAIN ARMS TRANSFERS.

See the discussion under Section 2 above.

SECTION 9. SPECIAL AUTHORITIES.

Section 614(c) of the Foreign Assistance Act of 1961 authorizes the President "to use amounts not to exceed \$50,000,000 of the funds made available under [the Foreign Assistance Act of 1961] pursuant to his certification that it is

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inadvisable to specify the nature of the use of such funds, which certification shall be deemed to be a sufficient voucher for such amounts." If the President uses this authority, he is obligated to "promptly and fully inform" Congress of the use of the funds.

The amendment to Section 614(c) simply clarifies that the President must fully inform Congress prior to the use of such funds.

SECTION 10. HOSTAGE ACT.

The Hostage Act of 1868 (22 U.S.C. 1732), which grants the President certain authorities to obtain the release of American citizens held hostage by foreign governments, is amended to clarify that the President's authority cannot be executed in a manner which would otherwise be prohibited by law.